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GENOCIDAL DISCREPANCIES

A genocide is a poisonous bush, that grows not from two or three roots but from a tangle of roots that has mouldered underground where no one notices it.

Claudine Kayitesi[1]

INTRODUCTION

Genocide may be the most recent crime to have been introduced into international criminal law, but its codification has been considered as the first human rights approach within the UN system[2] and is often called 'the crime of the crimes' in the international order. The need to introduce international criminal responsibility for genocide appeared after the Second World War, when atrocities committed by the Nazi regime elicited a worldwide reaction. Unfortunately, Lemkin's idea did not find its place among other international crimes in the Nuremberg trials, although it gave rise to the creation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The aim of this paper is to draw the reader's attention to its shortcomings and to propose developments in the elements of the crime of genocide.

1. PRELIMINARY REMARKS ON GENOCIDE

The name for this crime was proposed in 1944 by a Polish lawyer Raphael Lemkin, in his book titled '*The Axis Rule in Occupied Europe*'[3]. Initially, the Holocaust committed on the Jewish nation before and during the Second World War was called by Lemkin as 'ethnocide'. However, the concept of ethnocide, as proposed by Lemkin, was raised too late to be placed in the Charter of the International Military Tribunal in Nuremberg[4]; as a result, in the Nuremberg judgment it appeared as a crime against humanity[5]

[1] J. Hatzfeld, *Machete Season: The Killers in Rwanda Speak* (translation: Linda Coverdale), New York 2005, p. 90.

[2] A. Schabas, *Genocide*, "804 Max Planck Encyclopaedia of Public International Law" 2007, p. 2.

[3] R. Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress*, "The Lawbook Exchange" 2008.

[4] *Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, 82 UNTS, Vol. 279.

[5] International Military Tribunal, *Judgment of 1 October 1946*, [in:] *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (22 August, 1946 to 1 October, 1946), p. 501.

and the prosecutor at the Nuremberg proceedings used the term 'genocide' in the pleadings[6].

The name 'genocide' was firstly officially used in the UN General Assembly Resolution 96 (I) of 11 of December 1946. In this resolution, the General Assembly ascertained: "*[G]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings*"[7]. Genocide was understood as the partial or complete destruction of a group, committed on religious, racial, political or any other grounds. The resolution stipulated that the punishment of the crime of genocide was a matter of international concern, because each act of genocide formed a great loss to humanity, destroying the aggrieved group's contribution to humankind. At the same time, the Resolution provided no instruments allowing the crime of genocide to be punished, only **encouraging** States to undertake the necessary legislation for the prevention and punishment of the crime of genocide. Nonetheless, it was a big first step in the battle to implementing Lemkin's idea to both international and domestic legal systems. One year later, the General Assembly requested the Economic and Social Council to draft a convention on the prevention and punishment of the crime of genocide[8]. Resolution 180 (II) of 21 November 1947 ascertained that the crime of genocide entails an international responsibility of individuals, as well as States[9], and recognised three categories of the crime: physical, biological and cultural[10]. Finally, on 9 December 1948, the General Assembly adopted Resolution 260 A (III): Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: the 1948 Convention), which entered into force on 12 January 1951[11].

This did not mean that work ceased on developing the concept of genocide, since it became a subject of interest of international human rights organisations[12]. After fifty-seven years since the adoption of the 1948 Convention, the General Assembly, in its Resolution 60 (I): 2005 World Summit Outcome of 24 December 2005, reconsidered the issue of genocide, providing all States with the *responsibility to protect* the idea and imposing the obligation to protect all human beings from the crime of genocide[13]. The *responsibility to protect* doctrine, despite not being commonly accepted[14], implies a primary responsibility of the State to protect its population from international crimes, and if a State is unable or unwilling to protect, then the international community has

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[6] Ibidem, p. 43; see also: J.Q. Barret, *Raphael Lemkin and 'Genocide' at Nuremberg 1945–1946*, [in:] C. Safferling and E. Conze, *The Genocide Convention Sixty Years after its Adoption*, the Hague 2010, pp. 44–46.

[7] UN General Assembly, *Resolution 96 (I) of 11th of December 1946*, UN Doc. A/RES/96(I).

[8] UN General Assembly, *Resolution 180 (II): Draft Convention on Genocide of 21 November 1947*, UN Doc. A/RES/180.

[9] Idem.

[10] UN Economic and Social Council, *Resolution 77 (V): Draft Convention on the Prevention and Punishment of the Crime of Genocide*, 6 August 1947, UN Doc. E/573, p. 18.

[11] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, UNTS, Vol. 78, p. 277.

[12] See: art. 4(h) of the *Constitutive Act of the African Union of 1 July 2000*, OAU Doc. CABL/LEG/23.15 (2001).

[13] UN General Assembly, *Resolution No. 60 (1): 2005 World Summit Outcome*, 24 of October 2005, UN Doc. A/RES/60/1, pp. 138–140.

[14] E. McClean, *The Responsibility to Protect: The Role of International Human Rights Law*, „Journal of Conflicts & Security Law" 2008, Vol. 13, No. 1, pp. 123–152.

a secondary responsibility to protect that population. Hence, the relationship between the obligation to prevent genocide and the responsibility to protect raises some difficulties. It is suggested that the preventive aspect of the *responsibility to protect* doctrine becomes crucial, because there would be no need for intervention if the prevention was successful. On the other hand, the obligation to prevent genocide is legally binding in nature, while the *responsibility to protect* deals with morality and political commitment rather than internationally legal obligations[15], and therefore creates potentially weaker protection from genocide. However, the doctrine of *responsibility to protect* should be complementary to the obligation to prevent genocide arising from the 1948 Convention. Taking into account the nature of conflicts nowadays, however, as seen in Syria or Libya, the *responsibility to protect* seems rather a dead letter[16], and the international community has failed to protect civilians from massive atrocities, possibly also from genocide[17].

2. THE APPROACHES OF THE GENOCIDE CONVENTION

Article 1 of the 1948 Convention declares that genocide is an international crime, irrespective of whether it was committed in peacetime or at a time of war. The definition of genocide under the 1948 Convention is as follows: *'[I]n the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical or religious group, as such: killing members of the group (a); causing serious bodily or mental harm to members of the group (b); deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (c); imposing measures intended to prevent births within the group (d); forcibly transferring children of the group to another group (e).'* The statutes of *ad hoc* tribunals and the International Criminal Court have repeated the definition of genocide in the meaning of the 1948 Convention[18]. However, it is worth pointing out that cultural genocide has since been removed from the final text of the 1948 Convention.

Article 4 of the 1948 Convention sets out responsibility for: genocide, conspiracy, direct and public incitement, attempt and complicity in genocide. The Convention imposes an obligation on States to enact the necessary legislative procedure to implement these regulations, especially in the matter of punishing perpetrators of the crime of genocide. in addition, pursuant to Article 7, the Convention establishes a mechanism guaranteeing the prosecution of perpetrators, excluding political exceptions for extradition purposes. However, it does not provide any mechanisms for the prevention of genocide, creating

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[15] S. Pandiaraj, *Sovereignty as Responsibility: Reflections on the Legal Status of the Doctrine of Responsibility to Protect*, "Chinese Journal of International Law" 2016, Vol. 15, pp. 795–815.

[16] Ibidem, pp. 811–813.

[17] Al Jazeera, *Burundi Risks Genocide Amid Forgotten Conflict*, 15 November 2016, http://www.aljazeera.com/news/2016/11/burundi-risks-genocide-forgotten-conflict-161115142336120.html [22.06.2017]; see also: Human Rights Watch, *Sudan. Events of 2016*, https://www.hrw.org/world-report/2017/country-chapters/sudan [22.06.2017].

[18] See: Art. 6 of *the Rome Statute of the International Criminal Court*, 17 July 1998, UNTS 90/37; see also: Art. 4 of the UN Security Council *Resolution 827 (1993): Statute of the International Criminal Tribunal for the Former Yugoslavia*, 25 May 1993, UN Doc. S/RES/827 (1993); Art. 2 of UN Security Council *Resolution 955 (1994): Statute of International Criminal Tribunal for Rwanda*, 8 November 1994, UN Doc. S/RES/955 (1994).

instruments for the punishment of the crime only. The Convention introduces no enforcement procedures by which States would be obliged to adapt the 1948 Convention in their domestic legal systems. As a solution to the problem, the creation of a treaty body responsible for the control over the application of the 1948 Convention has been suggested[19]. Recalling the failure of preventive efforts that preceded tragedies in Rwanda and Srebrenica, in its Resolution 1366 of 30 August 2001, the Security Council underlined the importance and responsibility of States to prevent and end impunity for genocide[20]. Consequently, the Secretary-General appointed the first Special Adviser on the Prevention of Genocide, who acts as an early warning mechanism by bringing to the attention of the Secretary-General and the Security Council potential situations that could result in genocide[21]. Nevertheless, as can be found on the website of the Special Adviser, this institution, alone cannot prevent genocide[22]. The Office of the Special Adviser, however, makers some crucial remarks on the preventive aspects of the 1948 Convention, stressing the importance of better understanding the roots that lead to international crimes. Genocide does not constitute a spontaneous act, being rather a process over time, and there are always some warnings preceding the crime. Hence, the Office on Genocide Prevention has provided a Framework Analysis that helps to identify common and specific risk factors for atrocities[23]. However, the Special Adviser addresses the primary responsibility of individual states to prevent its population from genocide, since it contributes to both national and international peace and security[24].

From the 1948 Convention's entrance into force to the formation of the *ad hoc* Tribunals, only one case regarding individual criminal responsibility for genocide was upheld, although not explicitly in the context of genocide. It was the case of Adolf Eichmann, the main coordinator of the 'final solution' of the Jewish problem[25]. Eichmann was to be prosecuted in Nuremberg with other perpetrators of the Second World War, although he escaped to Argentina avoiding the Nuremberg proceedings. In 1960, Eichmann was finally captured and transported to Jerusalem, where the tribunal sentenced him to death, among other things **for crimes against the Jewish nation.** The jurisdiction of the Israeli tribunal was based on the Nazis and Nazi Collaborators Punishment Law No. 5710-1950 of 9 August 1950[26], which provided for the admissibility

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[19] A. Schabas, *Genocide*…, p. 18.

[20] UN Security Council, *Resolution 1366 (2001) on the Role of the Security Council in the Prevention of Armed Conflicts*, 30 August 2001, UN Doc. S/RES/1366(2001).

[21] UN Secretary-General, *Letter dated 12 July 2004 from the Secretary-General addressed to the President of the Security Council*, 13 July 2004, S/2004/567.

[22] See: Work of the Office of the Special Adviser on the Prevention of Genocide, http://www.un.org/en/preventgenocide/adviser/engagement_partners.shtml [26.10.2016].

[23] United Nations Office on Genocide Prevention and the Responsibility to Protect, *Framework of Analysis for Atrocity Crimes. A Tool for Prevention*, New York 2014, http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.49_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf [22.06.2017].

[24] Office of the High Commissioner for Human Rights, *Human Rights Resolution 2005/62: Convention on the Prevention and Punishment of the Crime of Genocide*, 20 April 2005, E/CN.4/2005/L.10/Add.17; see also: Human Rights Council, *Resolution 7/25: Prevention of Genocide*, 28 March 2008, A/HRC/RES/7/25 (2008).

[25] District Court of Jerusalem, *Attorney General v. Adolf Eichmann*, judgment of 12 December 1961, Case No. 40/61, 36 ILR 5.

[26] Israel, *Nazis and Nazi Collaborators (Punishment) Law No. 5710–1950*, 9.08.1950, Sefer Ha Chukkim No. 57 of 5710, p. 281.

of the prosecution of individuals suspected of crimes against humanity, war crimes and crimes against Jewish nation, committed under the Nazi regime. It should be noted that no legal system covered acts such as crimes against the Jewish nation. Such acts, under Article 1(b) of the Law, were as following: *'killing Jews; placing Jews in living conditions calculated to bring about their physical destruction; imposing measures intended to prevent births among Jews; forcibly transferring Jewish children to another national or religious group; destroying or desecrating Jewish religious or cultural assets or values; inciting hatred of Jews'*[27]. Comparing the abovementioned crimes with the acts listed in the 1948 Convention, there is no doubt that they constituted nearly identical offences[28].

3. REPERCUSSIONS UPON 1948 CONVENTION

The scope of the protection brought by Article 2 of the 1948 Convention covers national, ethnic, racial and religious groups. Unfortunately, this list eludes precise definition and leads to legal doubts[29]. In addition, it is commonly criticised as being too narrowly recognised[30], excluding other groups such as political or social ones[31]. As was mentioned before, Article 6 of the Rome Statute of the International Criminal Court, Article 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY) and Article 4 of the Statute of the International Criminal Tribunal for Rwanda (hereinafter: ICTR) cover the same list of protected groups. The problem, therefore, is not exclusively limited to the application of the 1948 Convention[32], but extends to the work of other international criminal tribunals. The discrepancies regarding the definition of protected groups have been visible in *Akayesu* case pending before the ICTR[33]. In that case, the question of categorising the Tutsi tribe in any of the protected groups appeared. The definition of each group remains unclear, since the 1948 Convention does not include any explanation of national, ethnic, racial or religious groupings. In the doctrine, it is suggested that such a phenomenon is caused by three reasons. Firstly, for a long time the Contracting Parties to the 1948 Convention considered the 1948 Convention as a dead letter[34]. The very first process that involved explicit responsibility for the crime of genocide was held in 1998 before the ICTR[35], so fifty years after the adoption of the 1948 Convention. Secondly, the meaning of the

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[27] Idem.

[28] M.J. Bazyler, J.Y. Scheppach, *The Strange and Curious History of the Law Used to Prosecute Adolf Eichmann*, "Loyola of Los Angeles International and Comparative Law Review" 2012, Vol. 34, No. 417, pp. 417–461, http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1685&context=ilr [19.10.2016].

[29] W.A. Schabas, *Genocide*…, p. 22.

[30] D.L. Nersessian, *The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals*, "Texas International Law Journal" 2002, Vol. 37, No. 2, pp. 232–276.

[31] F. Martin, *The Notion of 'Protected Group' in the Genocide Convention and Its Application*, [in:] P. Gaeta, *The UN Genocide Convention – A Commentary*, Oxford 2009, p. 112–127; see also: G. Werle, F. Jessberger, *Principles of International Criminal Law* (third edition), Oxford 2014, p. 288.

[32] C. Lingaas, *Defining the Protected Groups of the Genocide Through the Case Law of International Courts*, "International Crimes Database Brief" 2015, Vol. 18, p. 1, http://www.internationalcrimesdatabase.org/upload/documents/20151217T122733-Lingaas%20Final%20ICD%20Format.pdf [24.10.2016].

[33] ICTR, *Prosecutor v. Akayesu*, Judgment of 2 September 1998, ICTR-96-4.

[34] C. Lingaas, *Defining the Protected Groups*…, p. 4.

[35] ICTR, *Prosecutor v. Akayesu*…

protected groups has been changing since the adoption of the Convention, in response to the technological and sociological developments. Finally, it has been suggested that the interpretation of the protected groups under Article 5 of the 1948 Convention was purposefully left to the national legislation of the State Parties[36].

The ICTR in the *Akayesu* case based its judgment on *travaux préparatoires* of the 1948 Convention and the definition of the group as such. The Tribunal considered genocide as: *'targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth'*[37]. The ICTR also excluded groups that are more mobile and are joined by a voluntary commitment, among them economic or political groups. Afterwards, the ICTR defined each category of the protected groups. The Tribunal referred to the *Nottebohm* case rendered by the International Court of Justice[38] (hereinafter: the ICJ), ascertaining that membership in national groups arises from a shared legal bond based on common citizenship. Nationality, under the ICJ's judgment, is defined as *'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'*[39]. A national group is, therefore, determined strictly by citizenship, although Lemkin's idea on nationality was far wider and appealed to genuine traditions, culture and psychology[40]. An ethnic group was characterised by sharing a common language or culture[41], while racial grouping was marked out by hereditary physical traits, often linked to geographical regions[42], rather than other factors such as national, cultural, religious or linguistic ones. Finally, a religious group was described as sharing a religion, denomination or form of worship[43].

It is clear that these definitions are insufficient in the process of legal interpretation, since all of them entail further discrepancies. The ICTR brought a solution to the problem – providing a conviction for genocide despite the fact that the group involved could not be objectively included in one of the protected groups listed in the 1948 Convention. The tribunal referred to *travaux préparatoires* of the 1948 Convention, concluding that the crime of genocide is above all determined by its special intent, based on the partial or complete destruction of the group. This intent has become a constituent element of the crime, and without this element it would be impossible to consider such an act as genocide. For an assumption that an act constitutes a crime of genocide, it has to be committed against individuals because of their membership to a group. A victim, therefore, is chosen irrespective of its personal characteristic, but because of its membership to national, ethnic, racial or religious grouping. The Tribunal authorised individual criminal responsibility for genocide, even when an act was directed against a group other than one of those listed in Article 2 of the 1948 Convention. In the *Akayesu* case, the subjective element seemed to prevail, since the intention of the drafters of the 1948 Convention was to protect groups characterised by their stability and permanence. The actual status of such a group becomes irrelevant, as long as the perpetrator *tempore*

[36] C. Lingaas, *Defining the Protected Groups…*
[37] ICTR, *Prosecutor v. Akayesu…*, p. 511.
[38] ICJ, *Nottebohm case (Liechtenstein v. Guatemala)*, Judgment of 6 April 1955, I.C.J. Reports 1955.
[39] Ibidem, p. 23.
[40] C. LINGAAS, *Defining the Protected Groups…*, p. 6.
[41] ICTR, *Akayesu case*, p. 513.
[42] Ibidem, p. 514.
[43] Ibidem, p. 515.

criminis accounts such a group to one of those listed in Article 2 of the 1948 Convention[44]. This happened in Rwanda, where it was impossible to account the Tutsi tribe to any of the national, ethnic, racial or religious groups. Moreover, the Tutsi's mother tongue was exactly the same as Hutu. The ICTR concluded that, according to the drafters of the 1948 Convention, the intention was to protect any stable and permanent group. Since the Tutsi constituted a stable and permanent group, and were identified as such by all, they deserved the protection under 1948 Convention[45].

Turning to the issue of genocidal intent, it does not apply to actual result of the act, but to the intent of the perpetrator as such[46]. *Mens rea,* therefore, is directed to the destruction of a protected group. Subjects of the attack have to play a significant role in the aggrieved group, since the victim of genocide is the group itself, not individuals alone[47]. Jurisprudence in this issue, nonetheless, is diverse, since some tribunals require quantitative factors[48] while others take into account all the factual circumstances of the case, among them the nature of the conflict or the structure of the society on the territory where the crime was committed[49]. Furthermore, the responsibility for genocide emerges only when the genocidal intent is directed against the members of a group, whose elimination would lead to the partial or complete destruction of the group. It should be stressed that the subjective element cannot be interpreted *in abstracto* and the elimination of a leader of the group would not cause the responsibility of the perpetrator for genocide. Such a possibility would occur only when the elimination of an individual prompted the destruction of the group[50]. Moreover, in the case of different groups being the aim of the attack, genocidal intent has to be applied to each group separately[51].

The responsibility of individuals under the 1948 Convention is also irrespective of the context of a crime, specifically the existence of a policy or plan setting out the intention of the partial or full destruction of the group, as happens in the case of crimes against humanity. *Mens rea* does not involve any policy, so the crime might be committed individually. What is more, a personal motive, such as economic or political benefits, does not exclude the main (genocidal) intent of the perpetrator[52]. However, this has not been entirely adopted by the International Criminal Tribunal for the Former Yugoslavia. In its appeals judgment of 5 July 2001, in the *Jelisić* case, it expressed that a policy or a plan does not constitute a compulsory element of genocide, although the existence of such instruments might prove helpful when determining the subjective element of a crime and the genocidal intent[53].

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[44] W.A. Schabas, *Genocide*…, p. 24.

[45] ICTR, *Akayesu case*, p. 701.

[46] P. WEBB, *International Judicial Integration and Fragmentation. Genocide*, Oxford 2013, pp. 46–50.

[47] International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind*, "Yearbook of the International Law Commission" 1996, Vol. II, Part Two, p. 45.

[48] ICTR, *Prosecutor v. Semanza*, Judgment and Sentence of 15 May 2003, ICTR-97-20-T, p. 427.

[49] ICTY, *Prosecutor v. Krstić*, Appeals Judgment of 19 April 2004, ICTY-98-33, pp. 24–38; see also: ICTY, *Prosecutor v. Stakić*, Trial Chamber Judgment, 31 July 2003, IT-97-24-T, p. 523.

[50] P. WEBB, *International Judicial Integration*…

[51] ICTY, *Prosecutor v. Karadzic*, public redacted version of Judgment issued on 24 March 2016, Vol. I of IV, IT-95-5/18, p. 541.

[52] K. Ambos, *What Does 'Intent to Destroy' in Genocide Mean?'*, "International Review of the Red Cross" 2009, Selected Article on International Humanitarian Law, Vol. 91, No. 876, p. 837.

[53] ICTY, *Prosecutor v. Jelisić*, Appeals Chamber Judgment of 5 July 2001, IT-95-10-A, p. 48.

Referring to the jurisdiction on genocide on an international level, it is necessary to stress that, while adopting the 1948 Convention, the crime of genocide has been regulated by one legal regime, namely the jurisdiction of the ICJ[54]. Pursuant to Article 9 of the 1948 Convention, disputes relating to the interpretation, application or performance of the Convention between the Contracting Parties should be submitted to the ICJ. The ICJ has only ever heard one case concerning the responsibility of a State for the crime of genocide – *the Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide case)*[55], which dealt with the ethnic cleansing on the territory of the Former Yugoslavia in the 1990s. The UN General Assembly Resolution 47/121 of 18 December 1992 stipulated that a policy of ethnic cleansing, consisting of the creation of concentration camps in Serbia and Montenegro, was an act of genocide[56]. The International Court of Justice ascertained that 'ethnic cleansing' was, in practice, used for the process of cleansing the territory of groups with the use of force or methods of intimidation. It should be considered that ethnic cleansing was not included in the 1948 Convention. Moreover, such a proposition was rejected when drafting the 1948 Convention. Nevertheless, the ICJ declared that ethnic cleansing might be considered as genocide, though genocidal elements in the meaning of 1948 Convention had to be fulfilled. The *mens rea* of genocide is characterised by special intent – the total or partial elimination of a group. Ethnic cleansing in the form of deportations or the displacement of members of the group, even with the use of force, does not have to be perpetrated with this intent. Such acts could be recognised as genocide if they were undertaken through acts listed in the 1948 Convention, with the intent to fully or partially destroy a national, ethnic, racial or religious group. Nowadays, nonetheless, such an ethnic cleansing would be numbered among the crimes against humanity[57].

Although, before the Second World War, the unlawful conduct of an individual was attributed to a state, and hence individual responsibility was removed, the Nuremberg developments introduced individual criminal responsibility, and from then on there are two legal regimes on responsibility for international crimes[58]. As to genocide, since the adoption of the statutes of international criminal tribunals, the jurisdiction over genocide has been based on the following regimes: the jurisdiction of the ICJ on one hand, and the jurisdiction of international criminal tribunals on the other[59]. This may imply some repercussions, since there are potentially two international bodies that are capable of upholding the case regarding responsibility for the crime of genocide. However, the jurisdiction of the ICJ is based on the responsibility of States, whereas the capacity of international criminal tribunals exclusively concerns individuals. The 1948 Convention provides the State's obligation to prevent and punish genocide, while individuals may

[54] A. Cassesse, *Cassesse's International Criminal Law*, Oxford 2010, p. 112.

[55] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, I.C.J. Reports 2007, p. 43.

[56] UN General Assembly, *Resolution No. 47/121*, 18 December 1992, UN Doc. A/RES/47/121.

[57] W.A. Schabas, *Genocide*…, p. 21.

[58] A.B. Loewensten, S.A. Kostas, *Divergent Approaches to Determining Responsibility for Genocide: The Darfur Commission of Inquiry and the ICJ's Judgment in the Genocide Case*, "Journal of International Criminal Justice" 2007, Vol. 5, No. 4, pp. 839–857.

[59] A. Cassesse, *Cassese's International Criminal*…, p. 112.

be held responsible in a criminal nature[60]. Nevertheless, there has still been a risk that these two bodies will interpret certain elements of genocide differently.

Article 25(4) of the Rome Statute stipulates that *'no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law'*. The reverse provision has been introduced to Article 59 of the Articles on the Responsibility of States for Internationally Wrongful Acts of 2001[61]. However, it must be remembered that State responsibility has never been criminal in nature, contrary to individual responsibility[62].

By way of example, when it comes to the application of the 1948 Convention and the concurrence of individual and state responsibility, the UN International Commission of Inquiry on Darfur, a situation that was later referred to the ICC[63], ascertained that there can be two levels of *mens rea* distinguished in the context of genocide[64]. The perpetrator must intend to commit one of the acts listed in Article 2 of the 1948 Convention, specifically: killing or causing bodily or mental harm. The second level is called *dolus specialis,* which requires an intent to destroy the group as such. Such a approach, often called 'purpose-based'[65], was also considered by the International Court of Justice in the *Genocide* case[66]. At least on the point of individual criminal responsibility there are therefore no difficulties that intent poses in these two legal regimes. A discrepancy may appear when proving the intent of a State and of an individual. While proof of specific intent in individual criminal responsibility provides no further discrepancies, the intent of a State becomes difficult to establish, since intention *in principio* is individual in nature[67]. which therefore makes it difficult to characterise an act of a State as genocide, so it becomes unavoidable to invoke general rules applying in the context of a State's responsibility.

According to Article 2 of the Articles on Responsibility of States for Internationally Wrongful Acts, an internationally wrongful act of a State appears when conduct is attributable to the State under international law and constitutes a breach of an international obligation of the State. It is a well-established rule of international customary law that a State can act only by and through its agents[68]. The State, therefore, can commit genocide through the acts of its officials, and if an organ of a State commits

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[60] P. Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide?*, "European Journal of International Law" 2007, Vol. 18, No. 4, pp. 631–648.

[61] UN General Assembly, *Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, 54 UN GAOR Supp. (No. 10) at 43, UN Doc. A/56/83(2001).

[62] A.B. Loewensten, S.A. Kostas, *Divergent Approaches to Determining…*, p. 844.

[63] UN Security Council, *Resolution 1593 (2005)*, 31 March 2005, UN Doc. S/RES/1593/2005.

[64] International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1563 of 18 September 2004*, UN Doc. S/2005/60, 25 January 2005.

[65] A. Cassesse, *Cassese's International Criminal…*, pp. 118–119.

[66] ICJ, *Application of the Convention on the Prevention…*, p. 187.

[67] W.A. Schabas, *Genocide in International Law*, Cambridge 2000, p. 444.

[68] Permanent Court of International Justice, *Certain Questions Relating to Settlers of German Origin in the Territory ceded by Germany to Poland*, Advisory Opinion, 10 September 1923, Publications of the Permanent Court of International Justice, Series B, No. 6, p. 22; see also: ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment, merits, 27 June 1986, ICJ Reports 1986, p. 65.

any of the acts listed in the 1948 Convention, the responsibility of the State arises[69]. Hence, the International Commission of Inquiry on Darfur's report can meet with some objections, since the Commission has examined the intention of the central government and provided the analysis of the leadership's intent only. This, however, raises doubts on which high-ranking person is the leader. The statement of the Commission may be surprising also because of the fact that it did not ascertain genocide committed by the central government because of the lack of a state policy pursued by the government[70]. Neither the ICJ nor the ad hoc tribunals require such a policy as a compulsory element of genocide[71].

CONCLUSIONS

The crime of genocide is undoubtedly one of the worst atrocities that international law may face. For several decades, its criminalisation has been a dead letter, nevertheless, in 1990s that hibernation ceased, forcing the international community to face the atrocious incidents that took place in Rwanda or Srebrenica. Generally, the construction of the crime of genocide in the 1948 Convention may be recognised as acceptable. Nonetheless, there are shortcomings that need to be addressed. Most discrepancies may be removed by jurisprudence, though this would raise a plea of the infringement of certainty, which should be preserved in criminal law particularly. Although there is no hierarchy of international crimes, it is not for nothing that genocide is called 'the crime of crimes'. This is the reason why international criminal law should pay more attention to the developments of the modern world, since atrocities might affect groups other than those expressed in the 1948 Convention. Technological and sociological progress definitely imply the need to reconsider the scope of protected groups under the Convention and it may become essential to widen the scope of protection from atrocities to other groups that would not legally aspire to the crime of genocide.

Secondly, it may be unavoidable to introduce an enforcement mechanism into the 1948 Convention, for example the creation of a special body responsible for the prevention of the crime of genocide. Calling into existence a Special Adviser on the Prevention of Genocide within the UN system is, undoubtedly, one step ahead in that process, though, as expressed by the Office of the Special Adviser, this institution alone is not able to do anything. States should undertake more determined steps not only to punish genocide, but above all to prevent and protect human beings from the crime of genocide. This would not, unfortunately, happen without political will from international actors. In this aspect, the *responsibility to protect* doctrine may complement the obligation to prevent under the 1948 Convention by strengthening political will and morality to effectively protect human beings from international crimes.

[69] ICJ, *Application of the Convention on the Prevention*…, p. 179.
[70] International Commission of Inquiry on Darfur, *Report of the International Commission*…, p. 4.
[71] ICJ, *Application of the Convention on the Prevention*…, para. 373; see also: ICTY, *Prosecutor v. Jelisić*…;

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